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240-455—66

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 761

NORMAN M. LITTELL, PETITIONER

*v.*

STEWART L. UDALL, SECRETARY OF THE INTERIOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR STEWART L. UDALL IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–16) is not yet reported. Its opinion on an earlier phase of the case is reported at 338 F. 2d 537. The opinion of the district court is reported at 242 F. Supp. 635.

### JURISDICTION

The judgment of the court of appeals was entered on September 2, 1966 (Pet. App. 17). A timely petition for rehearing *en banc* was denied October 14, 1966 (Pet. App. 17). The petition for a writ of certiorari was filed on November 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Petitioner was retained as attorney for the Navajo Indian Tribe under a contract approved by the Secretary of the Interior, as required by statute. The question presented is whether such an attorney, who had admittedly violated the contract by using tribal staff attorneys for services that the contract required him to pay for from his own funds, is entitled to equitable relief against the Secretary of the Interior enjoining the Secretary from terminating the contract.[1]

## STATUTES INVOLVED

The statutes primarily involved are as follows:

R.S. 441, 5 U.S.C. 485, provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 10. Indians.
>
> * * * * *

R.S. 463, 25 U.S.C. 2, provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the manage-

[1] In the court of appeals, respondent challenged many of the district court's findings of fact, primarily on the ground that they were based upon mistakes of law, or were not supported by substantial evidence. Concluding that the case could be disposed of on admitted facts, the court of appeals found it unnecessary to deal with those issues. Also, having found that one charge against petitioner was sustained by the evidence, it found it unnecessary to consider other charges.

ment of all Indian affairs and of all matters arising out of Indian relations.

R.S. 2103, as amended by the Act of August 27, 1958, 72 Stat. 927, 25 U.S.C. 81, provides:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.
>
> Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from

which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter of condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

R.S. 2104, 25 U.S.C. 82, provides:

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act

of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

## STATEMENT

The Navajo Indian Tribe occupies an area of 24,000 square miles in four states and has large assets, including some $80,000,000 in the United States Treasury. It is governed by a Council of 74 delegates, elected every four years, and a Chairman similarly elected. The latter, the executive head, was, at the time of the events in this case, aided by an Advisory Committee of nine (R. 11, 13, 159).

Petitioner was first employed as attorney for the Tribe in 1947 under a 10-year contract (R. 22). Another 10-year contract was executed in 1957 (R. 35). Both contracts provided for two types of services. One was "General Counsel" activities, that is, representation of the Tribe in current affairs, advice concerning such matters, etc. The second was "claims" activities, that is, the prosecution, primarily before the Indian Claims Commission, of such claims as the Tribe might have against the United States for past wrongs. The General Counsel services were paid for by fixed fees, including the salaries of petitioner's associates. The number of such associates was increased, from time to time, by amendment of the contract (R. 50–114). The claims services were to be paid

for on a percentage basis from the recoveries obtained, if any, and the salaries of legal assistants employed by petitioner in prosecuting claims were to be paid by him. Use of General Counsel associate attorneys on claims matters was, with certain exceptions, specifically prohibited, absent prior approval of the Tribal Council and of Interior Department personnel (R. 39, 50–53).

In the tribal election of 1963, petitioner's activities and his alleged interference in tribal affairs were an issue in the campaign; one candidate for Chairman, Raymond Nakai, charged irregularities in petitioner's conduct (R. 319, 780–781, 1120, 1177, 1232). Nakai was elected and, after informal conferences, he and the Advisory Committee requested the Secretary of the Interior to remove petitioner as tribal attorney (R. 2649–2650). Under directions of the Secretary, the Solicitor of the Department of the Interior caused an investigation to be made. In November, 1963, the Solicitor wrote two letters to petitioner discussing three specific charges which had been made, requesting prompt response and stating that, absent convincing evidence, petitioner's contract would be terminated and the approval thereof withdrawn (R. 220–240).

Petitioner thereupon filed this suit to enjoin the Secretary of the Interior from taking any action to terminate the contract and to compel the Secretary to deal with petitioner as sole attorney for the Navajos. A preliminary injunction was granted, and this was affirmed by a divided court (338 F. 2d 537). After trial on the merits, the district court entered a permanent in-

junction directing the Secretary to deal with petitioner as tribal attorney, to approve payments to him and "to treat with, confer and negotiate with" him on the same footing as existed prior to April 1963 (R. 2683–2687).

The court of appeals unanimously reversed. It held that the Secretary of the Interior had power to cancel petitioner's contract pursuant to his duties to supervise Indian affairs (Pet. App. 6–11). It noted that, if there was substantial support for any one of the charges, the termination must stand (Pet. App. 12). It then emphasized the attorney's fiduciary duties and stated (Pet. App. 12–13):

> It is elementary, of course, that one seeking equity must do equity and must show "clean hands" at the threshold. And this being so as to the ordinary seeker of equity it can surely be no less true when an attorney seeks extraordinary equitable relief virtually constituting specific performance of a professional services contract against his client and against the client's guardian, as the Secretary of Interior is in this context.

Turning to the specific charges, the court of appeals found it sufficient that, by undisputed evidence and petitioner's admission, General Counsel attorneys had been used on claims cases, which amounted to "affirmative use—or misuse—of assets of the Tribe for his own interest." It concluded that, on the findings and petitioner's admission, this constituted an adequate ground for the Secretary's termination of the contract and that it was "unnecessary to deal with other findings of fact or conclusions of law" (Pet. App. 15, 16).

## ARGUMENT

The case presents an issue of limited importance. Indeed, since the term of all outstanding retainer agreements between a lawyer and an Indian tribe, other than petitioner's, is three years or less, the issue of administrative cancellation of such contracts is less likely to arise in the future. Nor is the decision below in conflict with any other decisions of any court.

Petitioner's assertions (*e.g.*, Pet. 12, 15, 19) that the decision is harmful to the Indians overlooks the duty of the Secretary of the Interior to exercise guardianship functions over the Indians. This was the basic error of the trial court. In its view, the inaction of the Tribal Council was controlling even upon the Secretary, whose sole remedy then was to persuade the majority of the Council to act. (See, *e.g.*, R. 2642b, 2675, 2618, 2676, 2612, 2619.) Federal supervision, by the Secretary, is not important merely to the minority members of the Tribal Council; it is to prevent undue influence, by attorneys or others, on the majority that exercise of the federal supervisory control becomes vital. As the court of appeals indicated (Pet. App. 6–9), it has long been held that the general authority over Indian affairs empowers the Secretary and the Commissioner to take any appropriate action to protect the rights of Indians. There is nothing in the language or the history of the statute here involved to justify the implication of denial of a power to withdraw approval previously given and to cancel attorneys' contracts when circumstances require.

The Secretary's duties do not terminate upon approval of the contract. Instead, he is obliged continuously to supervise performance thereunder, and he must approve all payments and changes which require amendments to the contract. Petitioner's argument (Pet. 12–15), that statutes granting those powers should be read to deny authority effectively to protect Indian tribes from their own officers if necessary, would nullify the basic purposes of such legislation. It is strange, indeed, for petitioner to contend that these statutes should be held to curtail the Secretary's powers, when the purpose clearly was to enlarge those powers to protect the Indians. "Great frauds and wrongs have been committed with impunity in the past by means of exorbitant and fraudulent contracts for nominal services * * *," said the House Committee in the report initiating this legislation. H. Rep. No. 98, 42d Cong., 3d Sess. (1873), p. 2. The activities of attorneys for Indian tribes were more recently investigated and criticized in S. Rep. No. 8, 83d Cong., 1st Sess. (1953). While petitioner makes broad assertions of long-consistent legislative, judicial and administrative construction (Pet. 15), he brings forth nothing to indicate lack of authority to cancel. His sole argument is the negative inference that, if the Secretary had the power, the statute would have been unnecessary. The court of appeals well stated the reasons why such inference does not follow (Pet. App. 9).

Petitioner does not deny the diversion of associate attorneys from work for which they were paid

by tribal funds to claims work for which he was obliged to pay them. Such a breach of duty by a fiduciary and an attorney is not to be dismissed as unimportant, nor disregarded because "[t]here has been no harm done to the Tribe" (Pet. 16). Nor is termination of the contract precluded because an alternate remedy (*e.g.*, a set-off) may have been available. See, *e.g.*, *In re Schatz*, 277 App. Div. 51, 97 N.Y.S. 2d 903; *Coviello* v. *State Bar*, 45 Cal. 2d 57, 286 P. 2d 357; *Bar Association of San Francisco* v. *Cantrell*, 49 Cal. App. 468, 193 Pac. 598.

Moreover, the adequacy of the set-off remedy is highly speculative. It imposes on the Tribe the burden of unscrambling the two types of services. The very volume of the service records of petitioner's assistants (which were put in evidence by the Secretary over petitioner's objection (R. 1216)) (Def. Ex. 4–8) supports the view that a proper allocation would be difficult (Pet. App. 15). More important, the set-off becomes available only if and when petitioner should receive a contingent fee. Whether that will happen is likewise speculative. Perhaps most significant is the fact that petitioner throughout this litigation has never offered to reimburse the Tribe for services rendered.

## CONCLUSION

The decision below is correct and presents no issue warranting review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*
EDWIN L. WEISL, JR.,
*Assistant Attorney General.*
ROGER P. MARQUIS,
HERBERT PITTLE,
*Attorneys.*

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